

BETWEEN: Jean Yves Bibi
Appellant

AND: Republic of Vanuatu
Respondent

Coram: Hon. Chief Justice V. Lunabek
Hon. Justice J. Mansfield
Hon. Justice R. Asher
Hon. Justice O. Saksak
Hon. Justice D. Aru
Hon. Justice V.M. Trief
Hon. Justice E. Goldsbrough

Counsel: Mr M. Hurley for the Appellant
Mr H. Tabi and Ms J. Toa for the Respondent

Date of Hearing: 5 May 2022

Date of Judgment: 13 May 2022

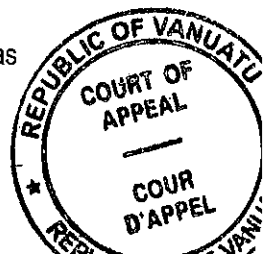
JUDGMENT

A. Introduction

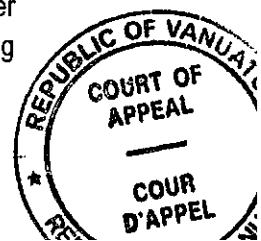
1. This is an appeal of the Supreme Court judgment dated 17 January 2022 dismissing the Appellant Jean Yves Bibi's claim for unjustified termination of his employment. The appeal is made on several grounds including that the Supreme Court judgment cannot be sustained given the factual findings made.
2. Mr Bibi also applied for leave to appeal out of time. He explained why the proposed appeal was filed 45 days late. His counsel had been overseas until March, alternative counsel decided not to proceed with an appeal and with the Covid-19 restrictions in place, it took more time before he could meet with his counsel and retain new counsel for the appeal. We consider there are good grounds explaining the delay and that there is merit in the appeal. There was no evidence of prejudice as counsel for the State ably assisted the Court with submissions. Leave is therefore granted.

B. Background

3. By contract of employment dated 24 September 2019, Mr Bibi commenced employment as the Secretary of the Public Service Commission (the 'Commission').



4. On 24 December 2020, Mr Bibi was suspended on full pay on an allegation by Helen John, a cleaner at the Commission, that on 23 December 2020, she saw Mr Bibi and the Manager Corporate Service, Mrs Louise Nasak 'engaged in an unacceptable behaviour'. At that time, the nature of the 'unacceptable behaviour' was not specified.
5. On Christmas morning, Mr Bibi and his wife Nelly Bibi spoke to Ms John. They evidenced that she did not maintain her allegation to them. They then took Ms John to see Mr and Mrs Nasak to advise that Ms John had recanted her allegation.
6. Following that, attempts were made to speak with the Chair of the Commission, Simil Johnson, firstly at his home but subsequently outside the Air Vanuatu office in Port Vila. Mr Johnson declined to entertain Mr and Mrs Bibi and Mr and Mrs Nasak at the time, offering no comment as the matter was under investigation.
7. The investigation team appointed carried out its investigation into the allegations against Mr Bibi and provided its 115-page report to the Commission on 13 January 2021. The report included some 17 findings related to Mrs Nasak as well as numerous other matters going back to August 2019 relating to Mr Bibi, besides the matter reported by Ms John. In relation to that aspect, the investigation team concluded that Mr Bibi and Mrs Nasak had failed to comply with generally accepted behaviour when found to be hugging and kissing on 23 December 2020 which violated section 34(1)(a) of the *Public Service Act*.
8. On 14 January 2021, the Commission met and considered the investigation report. It approved the report and directed that a copy be served on Mr Bibi with accompanying 14 disciplinary charges dated 15 January 2021. Charge 10 related to the incident witnessed by Ms John. Mr Bibi was also provided with witness statements by Mr Johnson and Ms John.
9. By letter dated 20 January 2021 Mr Bibi responded to the charges pointing to procedural irregularities and denying unacceptable behaviour. He pointed to the inconsistencies of Ms John's various accounts as evidencing her unreliability and attached a statement by Mrs Bibi relating to what occurred when he and Mrs Bibi had confronted Mrs John on the Christmas morning as confirming his version of events.
10. On 28 January 2021, Mr Bibi attended the hearing of the disciplinary charges before the Commission and was heard as to each of the charges.
11. On 3 February 2021, the Commission wrote to Mr Bibi advising him that he had 14 days to provide reasons why his employment should not be terminated. Mr Bibi responded by a short letter dated 16 February 2021 repeating his previous responses.
12. By letter dated 18 February 2021, the Commission terminated Mr Bibi's contract of employment on the grounds of serious misconduct namely that he interfered with the investigation and interacted with the complainant Ms John; that he attempted to influence the Commission's decision when confronting Mr Johnson, by threatening to take further action; and by accepting Ms John's confirmation that Mr Bibi and Mrs Nasak were hugging



and kissing during work hours, such conduct being unacceptable behaviour contrary to sections 34(1) and 36(1) of the *Public Service Act*.

13. On 12 March 2021, Mr Bibi filed his Claim for unjustified termination.

C. The Supreme Court judgment

14. The primary Judge heard from 3 witnesses for Mr Bibi. Mrs Bibi was cross-examined. The primary Judge concluded at para. 33 of the Judgment:

"I accepted Mrs Bibi as an accurate witness of the truth. Indeed, it was not suggested that she was anything other than that."

15. In respect of Mr Bibi, who was cross-examined, the primary Judge concluded at para. 48 of the Judgment:

"... his core evidence was consistent with that of his wife and the documentary exhibits. In short, putting aside some of the emotion and the natural tendency to slightly embellish for effect, I accepted him an honest and accurate witness."

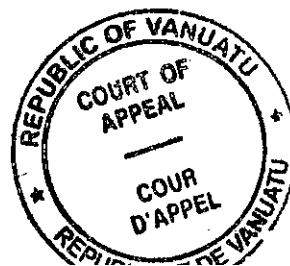
16. The primary Judge accepted the uncontested evidence of William Nasak, husband of Mrs Nasak, as to the events of Christmas morning including Ms John's recanting of her allegation, confirming the trip to Mr Johnson's home and subsequently seeing him outside the Air Vanuatu office. Mr Nasak's evidence, as well as that of Mr Bibi and Mrs Bibi, included details of what Ms John had said on that morning, including some things which might have cast doubt on her reliability about what she had seen on 23 December 2020.

17. James Melteres, Ms John, Mr Johnson and Brian Bani gave evidence for the State. The primary Judge concluded in relation to Mr Melteres at para. 60 of the Judgment:

"He was cross-examined on the basis that [he] was a reliable witness. There was no challenge to his veracity. I accepted his evidence."

18. Ms John was cross-examined. Her three statements were not, in detail, consistent. In particular, in her initial statement she had not described seeing Mr Bibi and Mrs Nasak kissing and hugging. There were other matters also which emerged in her cross-examination. The primary Judge referred to the concern Ms John no doubt had at what she thought she had seen and her reluctance to be too detailed in reporting conduct of her superiors in the office, and concluded at para. 68 of the Judgment:

"... That explained in my view the inconsistencies apparent between her versions. I accepted her to be a witness of truth, and that she was reliable. I considered her responses in cross-examination were appropriate and indicative of her veracity. Her indignation when denying that she had made up her allegation was telling and



credible. I consider it more likely than not that she did not recant her allegation on Christmas morning as suggested by Mr and Mrs Bibi and Mr Nasak..."

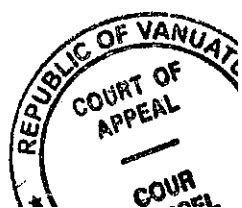
19. Mr Johnson was also cross-examined and found as follows at para. 74 of the Judgment:

"I accepted Mr Johnson as an honest and reliable witness."

20. Mr Bani was not required for cross-examination. His evidence was accepted.
21. The primary Judge found that Ms John had witnessed an intimate moment on 23 December 2020 in which Mr Bibi and Mrs Nasak were hugging and kissing each other. What had occurred was, to Ms John, unusual and unacceptable behaviour in the workplace. The Judge was highly critical of Mr Bibi and Mrs Bibi, knowing that an investigation would be conducted, to effectively confront Ms John firstly, and Mr Johnson secondly. He considered that those approaches were clearly designed to impact the investigation yet to occur. The other charges included matters accepted by Mr Bibi but were of much less consequence.
22. The primary Judge did not see merit in the procedural criticisms made. He referred to the provisions of the *Public Service Act* with the result that intimate hugging and kissing by married employees with persons other than their partners can fairly be described as unacceptable conduct in the workplace during working hours. The Commission had categorised the conduct as serious misconduct, as it was entitled to do and the Court could not decide otherwise. Accordingly, the termination of Mr Bibi's employment was held to be lawful in the circumstances.

D. Submissions

23. Mr Hurley submitted that although the primary Judge's finding in respect of Ms John was that she was a witness of truth and reliable, that she was not a reliable witness or in the alternative, that Mr Bibi was entitled to the benefit of the doubt that the charge against him was not proven. He pointed to the fact that Ms John gave 3 different versions to the Commission of what she witnessed between Mr Bibi and Mrs Nasak; that on Christmas morning, she recanted the version of events she had provided to the Commission; and that the Public Service Disciplinary Board had found Mrs Nasak not guilty as there was doubt about Ms John's various versions. Further he submitted that as appears in the Board's reasons concerning Mrs Nasak, the Board found it difficult to conclude that Mrs Nasak was guilty because Ms John had given conflicting statements and had confirmed during its hearing that she did mention 'vision'. That reference is to part of what the evidence for Mr Bibi reported as to the discussions on 25 December 2020. Mrs Nasak's employment had not been terminated.
24. The second and third grounds of appeal were that there had been unequal treatment under the law or administrative action (article 5(1)(k) of the Constitution) as Mrs Nasak's situation was not that different to that of Mr Bibi, and that the primary Judge failed to make any



findings and/or give reasons as to whether the Commission had complied with section 50(3) of the *Employment Act* before finding that Mr Bibi's contract was lawfully terminated and dismissing the Claim.

25. Mr Tabi submitted that notwithstanding the primary Judge's acceptance of all witnesses as truthful and reliable, it was within the Judge's discretion as to whose evidence he preferred, as in para. 68 of the Judgment:

"I consider it more likely than not that she did not recant her allegation on Christmas morning as suggested by Mr and Mrs Bibi and Mr Nasak."

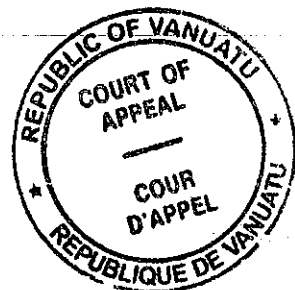
26. Further, that neither matter raised in the second and third grounds of appeal were pleaded in the Supreme Court.

E. Discussion

27. The primary Judge found all witnesses to be truthful and reliable or accepted their uncontested evidence. However, given that there is a fundamental dispute between Mr Bibi's denial of the allegation against him by Ms John, and Ms John's version making the allegation, both could not be reliable witnesses. The primary Judge preferred Ms John's version but did not explain why he rejected Mr Bibi's denial, after having found him to be a reliable witness.
28. Mr and Mrs Bibi and Mr Nasak gave evidence that Ms John recanted her allegation on Christmas morning. Ms John gave her evidence by way of 3 sworn statements (2 of which were filed after the evidence relied on by Mr Bibi was filed). She did not address the events of Christmas morning in any of her sworn statements. That evidence for Mr Bibi was therefore uncontested. However, the primary Judge did not set out reasons why he considered it more likely than not that Ms John did not recant her allegation on Christmas morning as evidenced by Mr and Mrs Bibi and Mr Nasak. He did not discuss the particular things which, on the evidence called for Mr Bibi, might have cast some doubt on her reliability.
29. Given the irreconcilable findings of credibility by the primary Judge on the fundamental issue of whether Mr Bibi and Mrs Nasak had been hugging and kissing, the appeal must succeed and the matter be remitted to the Supreme Court for rehearing.
30. As the appeal succeeds on the first ground of appeal, we need not consider the remaining grounds of appeal.

F. Result

31. The application for extension of time to appeal is granted.



32. The appeal is allowed.
33. The Judgment dated 17 January 2022 is set aside.
34. The matter is remitted to the Supreme Court for re-hearing.
35. The Respondent is to pay the Appellant's costs of the appeal to be taxed in default of agreement.
36. The costs of the trial before the Judge and of the further hearing are reserved to the Judge rehearing the matter for consideration and determination.

DATED at Port Vila this 13th day of May 2022

BY THE COURT

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Hon. Chief Justice Vincent Lunabek

